Supreme Court, U. S.
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IN THE

Supreme Court of the United States

NO. 77-783

A. B. MORRISON,

Petitioner

v.

AMOS E. REED,
Secretary,
Department of Correction
North Carolina,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Of Counsel:
ROBERT F. RUSH
300 Law Building
Charlotte, North Carolina 28202
Phone: (704) 332-6114
(Jo Hill Dobbins on Writ)

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

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IN THE

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_____Term, 1977

No. _____

A. B. MORRISON,

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v.

DAVID L. JONES,
Commissioner of Correction,
Department of Social
Rehabilitation and Control
for the State of North
Carolina,

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****

PETITION FOR A WRIT OF CERTIORARI
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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

The petitioner, A. B. Morrison, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on October 31, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is annexed to this petition as Appendix A. The opinion of the United States Court of Appeals for the Fourth Circuit is not reported.

The opinion of the United States District Court for the Western District of North Carolina is annexed to this petition as Appendix B. The opinion of the United States District Court for the Western District of North Carolina is reported at 428 F. Supp. 82 (W.D.N.C. 1977).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTION PRESENTED

Is a citizen's rights to a speedy trial under the Sixth Amendment of the Constitution of the United States violated when over three and one-half years elapsed between arrest and final conviction, during which time there was no active prosecution for two years and thereafter a nol pros was taken and the case remained dormant for an additional period of one year and the defendant was actually and substantially prejudiced by these lengthy delays.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States

AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF CASE

This proceeding arises in the United States Court of Appeals for the Fourth Circuit.

A.B. Morrison was convicted of second degree murder in Mecklenburg County Superior Court on April 16, 1973, and sentenced to serve twenty years in the state's prison system. His conviction was affirmed by the North Carolina Court of Appeals. State v. Morrison, 19 NC App 717, 199 SE2d 708 (1973). Certiorari was denied by the Supreme Court of North Carolina; State v. Morrison, 284 NC 621, 201 SE2d 691 (1974).

A.B. Morrison filed an application for a writ of habeas corpus in the United States District Court, Western District of North Carolina on May 1, 1974, alleging that he had been denied effective assistance of counsel, the right to procure a witness, and due process due to the judge's charges. On August 12, 1974, Honorable James B. McMillan entered an order denying the application. A.B. Morrison then moved the United States District Court for a rehearing with oral argument on the application. This motion was granted by the United States District Court September 23, 1974, and set for argument January 20, 1975. At the January 20, 1975 hearing A. B.

Morrison moved to amend the petition for writ of habeas corpus to include an allegation of failure to provide a speedy trial. Honorable James B. McMillian denied the motion to amend without prejudice to renew after state remedies had been exhausted. On February 14, 1975, A. B. Morrison filed a motion for a post conviction hearing in Mecklenburg County Superior Court. A plenary hearing on the matter was granted and was held on April 14, 1975. On June 17, 1975, the Honorable Fred H. Hasty, Senior Resident Superior Court Judge, entered an order denying the petition for post conviction relief.

Certiorari was denied by the North Carolina Court of Appeals on July 9, 1975. On July 15, 1975, A. B. Morrison filed a petition for a writ of habeas corpus in the United States District Court, Western District of North Carolina, Charlotte Division, reasserting his allegation that he was denied his constitutional right to a speedy trial and also requesting bond. On August 11, 1975, the United States District Court entered a Show Cause Order. On August 28, 1975, A. B. Morrison filed a motion requesting bond. The State answered on September 22, 1975. On January 30, 1976, an addendum to the petition for writ of habeas corpus was filed by A. B.

Morrison. On March 3, 1976, the District Court entered an Order requiring an evidentiary hearing on the question of the new evidence which was the basis of the reopening of the case by the prosecution. This hearing took place on April 26, 1976. The District Court on February 9, 1977 entered an order requiring that a writ of habeas corpus issue and that A. B. Morrison be released. The State of North Carolina gave notice of appeal from the decision of the District Court on March 1, 1977 which appeal was docketed on March 18, 1977 with the United States Court of Appeals for the Fourth Circuit.

The matter was argued October 5, 1977 before the United States Court of Appeals for the Fourth Circuit and on October 31, 1977 the order of the district court was reversed.

STATEMENT OF FACTS

On September 4, 1969, a warrant was issued for the arrest of Alvin B. Morrison, along with George E. Cox, for First Degree Murder. On September 6, 1969, Morrison and Cox were arrested in Kentucky and remained in jail there until they were brought to the city of Charlotte, North Carolina on November 19, 1969 pursuant to an extradition warrant. On January 5, 1970 an

indictment and true bill were found by the grand jury against both A. B. Morrison and George E. Cox. Morrison remained in jail until February 16, 1970, when he stood trial in the Superior Court of Mecklenburg County, North Carolina, for second degree murder. George E. Cox became the principal witness for the State and thereafter the State elected to take a nolle prosse in the case against George E. Cox. A unanimous verdict could not be reached in the case and a mistrial was declared. A. B. Morrison was released on a $7,500.00 bond.

After the mistrial was declared, no action was taken in this case until January 20, 1972, and no further investigation was made. Nothing was done by the State of North Carolina to resume the prosecution of this case and it was recalendared on January 20, 1972. Peter Gilchrist, the Assistant District Attorney, reviewed the matter and determined that there was no evidence which had not been presented in the first trial to indicate that a successful prosecution could take place, and on January 20, 1972, the Assistant District Attorney elected to take a Nolle Prosse with leave.

The case continued to remain dormant until August, 1972, when

Lt. Smith of the Mecklenburg County Police Department allegedly received a telephone call from Mr. Linville Spencer in Kentucky who said he had a pistol which A. B. Morrison said he had used to kill a man in North Carolina. Mr. Spencer came to Charlotte with the weapon and made a statement to the police. On the basis of this information, the Assistant District Attorney decided to re-open the case and asked the Court to re-calendar the case based upon this information. On December 13, 1972, the case was re-opened by order of the court and a bond for his appearance was set at $1,000.00. Morrison waived extradition. The trial was scheduled for April 24, 1973. The court-appointed attorney for Morrison filed a motion for a continuance because Morrison's privately retained counsel in Tennessee would be unable to be present for the trial. The motion was denied.

Before the trial, the Assistant District Attorney determined that the alleged weapon and new evidence that he had received and used to re-open the case was false and unreliable. This was known to him to be false before he began the second trial. It was further known to the Assistant District Attorney that not only was the evidence allegedly produced by Linville Spencer false, but that there

was a revengeful purpose behind the statement and production of the alleged murder weapon on the part of Spencer. The District Attorney had also determined before the trial that the weapon had not been sold to the original purchaser until after the murder and that the police department's ballistics experts had examined the gun and concluded that it was not the murder weapon. Nevertheless, the District Attorney decided to proceed to trial. Linville Spencer did not testify at the second trial.

A. B. Morrison was convicted of second degree murder and sentenced to twenty years imprisonment.

The evidence at the second trial covered substantially the same ground as that at the original trial, with three exceptions. These exceptions were the testimony of the witness Whitfield, the testimony of the witness Bryan, and the testimony of Morrison himself denying all guilt.

George E. Cox was the principal witness and his testimony at both trials tended to show the following:

Cox and Morrison worked for Connelly Home Improvement Company in Ashland, Kentucky. They and their wives were friends. Cox had a heart attack and moved back to Locust, North

Carolina. In early September, 1969, pursuant to some telephone conversations, Morrison and his wife drove from Kentucky to North Carolina to meet Cox and talk about going back into business together, either in North Carolina or back in Kentucky with Connelly.

Ralph Gordon, the deceased, was a stranger to Morrison but a personal friend of Cox. Gordon and Cox had known each other for six or seven years and had lived and worked together. They renewed close contacts when Cox returned to North Carolina.

Morrison, his brother, wife, and children went to the Cox's house. It was Labor Day Weekend. The Morrisons and Cox and Gordon started drinking together and drank considerable amounts over a period of many hours. The three men then went to a river house owned by L. T. Smith and remained there drinking and playing cards from about 6:30 or 7:00 in the evening of September 3rd until about 11:00 p.m. They had dinner, played the guitar, and sang. There was a dispute between Morrison and Gordon over a poker hand involving a pair of queens but there was no violence. They compromised by "splitting the pot," and played some more poker later on and Morrison won.

Morrison and Cox and the deceased, Gordon, left the Smith cabin, all fairly well intoxicated, about 11:00 P.M. or later. They headed east toward Locust some thirty or forty miles away. They stopped at an Esso station in Charlotte at Tryon Street and Sugar Creek Road. Gordon got out of the car to call a friend or a taxi to complete the trip to his home. Later, Cox testified, Gordon re-joined them at a restaurant a short distance away. The witness Cox said that he, being pretty drunk, went to sleep or "passed out." He was awakened by the sound of gunshots and looked around and saw that he was alone in the car in a church yard. He went back to sleep and the next thing he remembered was Morrison waking him and asking him to drive the rest of the way home. On the way home, Cox said, Morrison told him that he had killed Gordon. Cox did nothing about it and expressed only momentary surprise and disbelief. He said, in fact, that he did not believe it.

The next day, Morrison and Cox drove with their families to Kentucky and spent the night in a motel near Morrison's Kentucky home. They were arrested on September 6th when they went to Morrison's home.

In another version of Morrison's statements, Cox testified that Morrison told him while they were in jail in Kentucky, that Gordon had attacked him with fists, and had pulled a gun on him and had actually fired at Morrison and that Morrison had taken the gun away from Gordon and killed him.

Other witnesses testified about the various events at the Smith river house that night, but Cox was the only witness to any of the events that took place after Morrison, Cox, and the deceased left the Smith house after 11:00 P.M.

There was no evidence that Morrison had a gun that night. Cox stated that there was no gun in the car. There were no fingerprints or other marks. There was no physical evidence. The only evidence against Morrison (other than statements by police relating what Cox had said to them) was the testimony of Cox himself.

L. G. Whitfield was an attendant at the Esso station. He had been known as a witness by the prosecution at the first trial but had not been called to testify.

Whitfield testified at the second trial that on the night of the murder three men in a car stopped at his

station and asked for directions to Locust, North Carolina, and that he saw the handle of a gun on the front seat of the car. Whitfield had given a statement to the police five weeks after the death, but had not mentioned a pistol. He could not identify Morrison or Cox. He stated that Morrison "resembled" the man that asked for directions. (Cox's testimony had shown that Cox asked for directions). Whitfield himself stated that it had been a long time and he had been through a "whole lot of stuff" since then.

The prosecuting attorney at the second trial was a new man who had not conducted the first trial. He testified in an effort to explain why Whitfield had not been called as a witness in the first trial and could only say that he was informed that either he was in the hospital or for some reason he had not testified at the first trial. This falls far short of a competent showing that the witness Whitfield was in fact unavailable at the first trial and does not answer why, if due care had been taken to prepare the case for the first trial, it was not postponed as a routine matter upon motion or decision of the prosecutor.

Howard Bryan testified at the second trial. He had also been known

to the prosecution at the time of the first trial but the state had elected not to offer his testimony at the first trial.

His testimony at the second trial was that a week or so before Morrison came to North Carolina, Morrison had asked him where he could buy a pistol for the protection of his wife. Bryan and Morrison went to the home of Bryan's cousin, looked at a pistol and tried it out. He testified that Morrison bought the gun, a .38 caliber pistol of Spanish make, some twenty-five or thirty years old. He also testified that his cousin had died two years before on December 15, 1971.

Morrison testified that he and Cox parted company with Gordon, the deceased, at the Esso station and that he never saw him again. He testified that he purchased food for Cox's family and was trying on the trip to North Carolina to help Cox get back on his feet financially. He testified that he never bought the gun from Bryan's cousin.

Thus, the only new evidence at the second trial was the circumstantial evidence presented by the testimony of the witnesses Whitfield and Bryan. This testimony convicted Morrison and he was sentenced to twenty years imprisonment.

REASONS FOR GRANTING CERTIORARI

1. The decision below should be reviewed because the United States Court of Appeals for the Fourth Circuit has rendered a decision that is in direct conflict with the United States Supreme Court's decision in Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 LEd2d 1 (1967). Moreover, the United States Court of Appeals for the Fourth Circuit refused to construe Klopfer in pari materia with Barker V. Wingo, 407 US 514, 92 S.Ct. 2182, 33 LEd2d 101 (1972).

2. This case involves the application of criteria for determining when a speedy trial has been denied, formulated by Barker v. Wingo, 407 US 514, 92 S.Ct. 2182, 33 LEd 2d 101 (1972). The decision below should be reviewed because the United States Court of Appeals for the Fourth Circuit has rendered a decision that conflicts with this Court's decision in Barker.

3. There is substantial conflict and variance in application among the various circuit court of appeals as to the analysis of the balancing test described in Barker v.

Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 LEd2d 101 (1972). This instant case is an excellent opportunity for the Court to reconcile these conflicts, refine its meaning, and prevent a growing, unacceptable trend toward constriction of speedy trial rights.

1. The decision below should be reviewed because the United States Court of Appeals for the Fourth Circuit has rendered a decision that is in direct conflict with the United States Supreme Court's decision in Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 LEd2d 1 (1967). Moreover, the United States Court of Appeals for the Fourth Circuit refused to construe Klopfer in pari materia with Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 LEd2d 101 (1972).

All of the courts below refused to consider the Klopfer decision in rendering their decisions. The United States Court of Appeals for the Fourth Circuit summarily dismissed Klopfer by way of a footnote stating that the United States Supreme Court found that the procedure was unusual and was of uncertain origin in North Carolina and that statutes and case law provided authority for entry of the nol pros "with leave." This was not the crux of the Klopfer decision which found that when North Carolina used this procedure for an "unjustified postponement of trial for an accused discharged from custody", it was an unconstitutional denial of his right to a speedy trial. Klopfer, 386 U.S. at 219.

The North Carolina Supreme Court

had held in North Carolina v. Klopfer, 266 N.C. 349, 145 SE2d 909 (1966), that if a prosecutor decided after a mistrial due to a hung jury that another trial would not be worth the time and expense of another effort that he could take a nol pros and retry him at a subsequent term. Under such conditions, the defendant did not have the right to compel the State to prosecute him.

This practice of nol pros was rejected in Klopfer by the United States Supreme Court that found all of the other courts that had considered the matter had rejected it except North Carolina and Pennsylvania.

The United States Court of Appeals for the Fourth Circuit also failed to follow the reasoning it adopted in Lassiter v. Turner, 423 F2d 897 (1970). In Lassiter, a defendant was coerced into a guilty plea in another charge because the district attorney threatened to revive a prosecution that was over five years old. The Lassiter case per se shows the dangers inherent in the procedural process known as nol pros as used by the State of North Carolina. Although Lassiter did not object to the suspension of the secret assault prosecution five years prior, the Court went on to say "This is not to say, however, that there was a

waiver of the right to a speedy trial. There is no evidence that he knew of his right to a speedy trial or that he intended to relinquish it. Klopfer held that the right guaranteed by the Sixth Amendment extends, through the Fourteenth Amendment, to persons accused under state law." Lassiter, 423 F2d at 903. The United States Court of Appeals for the Fourth Circuit repeated the findings in Klopfer that this unusual procedure known as nol pros had been rejected by all other courts considering it. The Court specifically stated "that the argument that the right to a speedy trial does not afford affirmative protection against an unjustified postponement of trial has been explicitly rejected by every other State Court [other than North Carolina] which has specifically considered the question. (386 US at 219, 87 S.Ct. at 991)." Lassiter, 423 F2d at 903.

This simply points out the confusion that exists with reference to this unusual process. The Court seems to accept the Klopfer reasoning in the Lassiter case, but explicitly rejects Klopfer in the present case. In the present case Morrison contends that the Lassiter and Klopfer cases are applicable to the questions presented in his case. The United States Court of Appeals should not only have

construed Klopfer in pari materia with Barker v. Wingo, supra, but should have considered the Klopfer decision as applied in Lassiter.

This unacceptable procedure of nol pros was used against Morrison in spite of Klopfer and Lassiter. It remained in customary practice and use in North Carolina until North Carolina finally recognized this procedure as being an inhabitant of Pandora's Box. It was replaced by the 1973 Criminal Procedure Act, Session Laws 1973, C. 1285, S.26, effective July 1, 1975. This new act requires that if a voluntary dismissal is taken, it is a final dismissal and new charges must be brought within the statute of limitations if no jeopardy has attached. In Article 50 of the North Carolina General Statutes, the official commentary made special mention that the Klopfer case had stated that the system of "nol pros" previously used was unconstitutional when it left charges pending against a defendant and he was denied a speedy trial.

Shouldn't North Carolina be taken to task one more time by the highest Court of our land for its unconstitutional use of the procedure of nol pros?

2. This case involves the application of criteria for determining when a speedy trial has been denied as formulated by Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 LEd2d 101 (1972). The decision below should be reviewed because the United States Court of Appeals for the Fourth Circuit has rendered a decision that conflicts with this Court's decision in Barker.

The Supreme Court denominated four factors as a balancing test to be considered along with other relevant factors in determining whether or not a citizen has been denied his right to a speedy trial: length of delay, the reason for the delay, assertion of the right to speedy trial, and prejudice to the defendant. Barker v. Wingo, 407 U.S. at 530.

The United States Court of Appeals for the Fourth Circuit not only failed to consider all four factors, but failed to weigh each factor according to the guidelines set forth in Barker.

1. Length of Delay

The Court below conceded and agreed with the United States District Court for the Western District of North Carolina that the length of time between the arrest and final conviction was sufficient to act as a "triggering

mechanism" to inquire into the three remaining factors identified in Barker. But the Court failed to pay even lip service as to the reason for the delay and weigh this factor heavily against the government.

Although the Court in Barker did not set forth an exact amount of time at which there is an encroachment upon a citizen's right to a speedy trial, the many months that elapsed in the Morrison matter should have been weighed heavily against the State and heavily in favor of the Defendant. Such was the finding of the United States District Court for the Western District of North Carolina.

The Court must consider Klopfer, supra, at this point in pari materia with Barker because of the unacceptable machinery of nol pros that was used to delay the trial.

Inasmuch as the length of delay is conceded by the court below, although apparently given no weight in the balancing of the factors, we move to the next balancing factor as set forth in Barker.

2. Reason for Delay

The United States Court of Appeals for the Fourth Circuit failed to consider or discuss the second factor

enumerated in Barker.

The State admits that in January of 1972 a decision was made that a retrial would be unsuccessful and took a nol pros with leave to hold the indictment open. The Court of Appeals for the Fourth Circuit ignored the fact that Klopfer had already decided that this was unacceptable and unconstitutional inasmuch as it denies speedy trial. In light of the fact that North Carolina had been informed through Klopfer that this is an unjust postponement, it must be declared by this Court to be a deliberate attempt to delay the trial by unconstitutional methods.

In Lassiter, supra, the United States Court of Appeals for the Fourth Circuit had already found this same procedure to be unjustified. Heavy weight should be given to a deliberate attempt on the part of the prosecution to delay a trial. Barker v. Wingo, 407 U.S. at 531.

If allowed to stand, the procedure of using a nol pros as inflicted on the Petitioner herein will have staggering implications to the right of speedy trial. It will allow the State to wait (either before a trial or after a hung jury) until new leads or new witnesses appear before

further prosecution, even if the new information is not presented in the trial. It will destroy the speedy trial right with the use of a nol pros and may even go on to the Federal Courts and make the Federal Speedy Trial Act (18 U.S. Code 1361, et seq.) meaningless.

3. Assertion of Right

Morrison does not contend that he slept at the courthouse doorsteps crying out to be prosecuted. There are few such people on the courthouse doorsteps and even fewer within the prison walls. But his failure to "wail" is not fatal according to Barker. Barker v. Wingo, 407 U.S. at 528.

Later in Strunk v. United States, 412 U.S. 434, 93 S.Ct. 2261, 37 LED2d 56 (1973), this Court refined its position on assertion of right in footnote 2. "It can also be said that an accused released pending trial often has little or no interest in being tried quickly; but this, standing alone, does not alter the prosecutor's obligation to see to it that the case is brought on for trial...."

As the years pass it is not unreasonable to assume that the gov-

ernment has abandoned its prosecution. "It is commonly understood that the defendant will hesitate to disturb the 'hushed inaction' by which dormant cases have been known to expire." United States v. Mann, 291 F. Supp. 268, 274-275 (S.D.N.Y. 1968).

Morrison made no effort to evade or delay retrial at any time. There was every indication that he would not be retried. The case lay dormant without any investigation being made by the prosecution for twenty-three months after the first trial. A nol pros with leave was entered. The case remained dormant again for a year. The State's own testimony shows that they did not feel they could have a successful prosecution. His court-appointed attorney indicated to Morrison that he would not be retried and that the State planned to nol pros the matter.

To mandate the citizen to be completely responsible for the preservation of his Sixth Amendment rights does not withstand the test of reasonableness. The citizen is usually neither practicably nor legally in control of the trial of his case. Requiring such mandate inevitably compels forfeiture. Ignorant forfeitures under any circumstances should never be tolerated in a free society.

4. Prejudice

The United States Court of Appeals for the Fourth Circuit stated there was no showing of prejudice. It refused to take into consideration either the actual prejudice to this Petitioner's defense or the anxiety and concern that accompanied him for these years.

Evidence at the first trial covered substantially the same ground as the original trial with three exceptions: the testimony of the witness Whitfield, the testimony of the witness Bryan, and Morrison himself.

Whitfield, the attendant at the service station, was not called to testify at the first trial even though the prosecutor knew him as a witness. His testimony at the second trial (that he saw a gun on the front seat) was substantially different from a statement he gave to the police shortly after the murder and substantially different from the testimony of the principal witness for the state and co-defendant. He identified Morrison as the man sitting on the passenger side of the automobile, but the principal witness and co-defendant, Cox, had testified that he himself was seated in this position. His testimony about the gun and his identification could

have been challenged and tested by fresh memory and circumstances. The prosecuting attorney at the second trial could not explain why Whitfield had not been called to testify at the first trial or why the case had not been postponed if he had been unavailable.

Bryan also testified at the second trial even though he had not testified at the first trial. He stated that Morrison had purchased a pistol from Bryan's cousin about a week before the murder. The cousin from whom Morrison had allegedly bought the gun had died, according to Bryan, on December 15, 1971. This is almost a year after the mistrial. Had a speedy trial followed the mistrial, Morrison could have subpoeaned Bryan's cousin to challenge Bryan's testimony.

The "new" evidence at the second trial was totally circumstantial. But this circumstantial evidence, that had been available at the first trial, made the difference between acquittal and conviction. Morrison was unable to challenge Whitfield's testimony because it was not fresh in his memory. Bryan's cousin had died and could not be called as an important defense witness.

Were it not for this "new" circum-

stantial testimony, Morrison probably would not have been convicted. His defense was greatly prejudiced by the delay.

Additionally, according to Lassiter v. Turner, 423 F.2d 897, 903 (4th Cir. 1970), the defendant in the present case has met the North Carolina requirement of a "reasonable possibility of prejudice." Certainly three and one-half years between arrest and final conviction is a sufficient period of time for the possibility of prejudice to creep in. According to Lassiter, there need only be the possibility of prejudice as opposed to actual or probable prejudice. The United States Court of Appeals for the Fourth Circuit refused to consider this North Carolina requirement as set forth in Lassiter and previously set forth in State v. Johnson, 275 N.C. 264, 167 S.E.2d 274 (1969).

Neither can personal prejudice to Morrison be ignored in the light of the extended time in which his freedom was held in limbo for over three years. In Strunk v. United States, 412 U.S. 434, 93 S.Ct. 2261, 2263, the Court recognized that "prolonged delay may subject the accused to emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial...

uncertainties that a prompt trial removes." (Emphasis added). This is especially true in a capital case such as the present one.

The United States District Court for the Western District of North Carolina found as a fact that actual prejudice was shown by the difference in Whitfield's statement to the police and his testimony three and one-half years later in the second trial. As stated in that opinion, Testimony three and one-half years old is far less precise and reliable that testimony given promptly after an event."

CONCLUSION

When all of the factors enumerated in Barker are weighed and balanced, the extraordinary delay between arrest and conviction must be weighed heavily against the government, as must the unjustified and unconstitutional procedure used to deliberately delay the trial. The actual and substantial prejudice to the Petitioner's defense and the anxiety and concern that accompanied him for three and one-half years must weigh most heavily in his favor. The fact that Morrison did not stand at the prosecutor's door demanding a retrial cannot be weighed heavily against him under his circumstances inasmuch as it is the duty of the State to bring a case to trial.

3. There is substantial conflict and variance in application among the various circuit court of appeals as to the analysis of the balancing test described in Barker v. Wingo, supra. This instant case is an excellent opportunity for the Court to reconcile these conflicts, refine its meaning, and prevent a growing, unacceptable trend toward constriction of speedy trial rights.

Until Barker v. Wingo, supra, in 1972, speedy trial was largely undefined. Barker set out a balancing test with four factors to be considered: length of delay, reason for delay, assertion of right, and prejudice to the defendant. However, many facets have been criticized and many questions remain unanswered.

In 1975, Assistant Professor of Law, D.S. Rudstein, studied the lower court decisions to determine if and how the broad standards of Barker had been applied and if mere lip-service had been paid to the balancing process. Rudstein, The Right to a Speedy Trial: Barker vs. Wingo in the Lower Courts, 1975 Univ. Ill. L.F. 11 (1975). His examination of lower court decisions revealed a need for the Supreme Court to reformulate or at least refine the balancing test of Barker. The conflicts in the opinions are legion. A brief

discussion of some of these conflicts follows to demonstrate the urgent need for reformulation or refinement.

Length of Delay

The Court in Barker stated that if the delay is "presumptively prejudicial," it triggers an inquiry into the other factors. To determine whether or not the delay is "presumptively prejudicial" depends upon the circumstances of each case. Less delay can be tolerated for an ordinary street crime than for a serious, complex conspiracy. Most lower courts ignore that types of offenses should be treated differently and have generally set a time limit of one year as being "presumptively prejudicial."

However, in computing the length of delay, many courts have subtracted the time period not attributable to the prosecution or orderly processing of the case from the total length of delay. This was not suggested in Barker nor in the later decisions of Strunk v. United States, 412 U.S. 434, 93 S.Ct. 2261, 37 L.Ed.2d 56 (1973) and Moore v. Arizona, 414 U.S. 25, 94 S.Ct. 188 38 L.Ed.2d 183 (1973).

There is disagreement as to whether the length of delay is to be used only as a triggering mechanism

or whether it should be given weight in the balance test. Surely a defendant whose trial was delayed four years should be given more weight than one which was delayed only one month. Unless this factor is weighed in the balancing process, the State will not try to lower its court congestion or attempt to overcome its negligent treatment of cases.

Reason for Delay

In Barker, supra at 531, the Court concluded that different weights should be given for different reasons for delay.

> "A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay."

For a valid reason, the government may take an "appropriate" delay. The major problem is how long is a valid delay "appropriate". The lower courts have held that valid delays are "justified" for almost any period of time.

Negligence and over-crowded court dockets are examples of "neutral" reasons for delay. Barker stated that under these circumstances, this factor should be weighed "less heavily" against the government, but nevertheless weighed. However, most lower courts justify a delay due to court congestion and give no weight to this factor. A few courts, because of Justice White's concurring opinion in Barker, have weighed crowded court dockets heavily against the government since the defendant is not responsible for the condition.

Negligent delays have been weighed lightly against the government and most courts discount it entirely.

Only two courts have found an intentional delay situation. In Arrant v. Washington, 468 F.2d 677 (5th Cir. 1972), cert. denied, 410 U.S. 947 (1973), out of a two year delay, fifteen months was considered unjustified and weighed heavily

against the government. The only reason the government gave for the delay was that it felt it could not convict the defendant earlier. This case is analagous to the instant case for this reason.

In U.S. v. Hanna, 347 F. Supp. 1010 (Del. 1972), the defendant was told that he would not be prosecuted if he co-operated to convict another individual. Although he co-operated, he was subsequently indicted for this offense and another. The Court condemned the government for "lulling the defendant into a false sense of security" that he would not be tried.

Although Barker does not say that a deliberate delay is necessary to a denial of speedy trial rights, most lower courts have held that a good faith attempt on the part of the government is a justification for a lengthy delay of trial.

Assertion of Right

In Barker, the Court rejected the demand-waiver policy. The lower courts have had little difficulty in determining whether a defendant has adequately asserted his right and have generally been liberal in approving the method used. However, the assertion must also be timely and the court will look behind the formal demand for trial to

try to determine whether the defendant really wanted a speedy trial. There is great danger of interpreting a legitimate demand for trial as merely pro forma and finding that the defendant did not want a speedy trial when he actually did. Indeed, there is even this danger when a defendant makes no assertion of his right.

Except for speedy trial rights, no other fundamental right is lost except when expressly waived. Silence should not be considered a waiver. A defendant should not be required to seek his own prosecution.

If Barker had considered the right to a speedy trial and assertion of that right in traditional waiver terms, it is likely that the results reached in many cases would have been different.

Prejudice

In Barker, the Court stated that the possibility that the defense will be impaired is very serious and a major purpose of speedy trial.

The Court did not discuss the burden of proof on this issue and this has been criticized as a weakness in the Court's opinion, since proof of actual prejudice may be difficult

to show.

Witnesses that have died or disappeared and loss of memory (which is hard to reflect in the record) are examples given of possible prejudice to the defense.

However, in practice, the lower courts have put too much burden on the defendant and have required him to show actual and substantial prejudice before weighing this factor in his favor. Even though a witness is missing, many times the defendant must show that he could have aided his defense and that the testimony would have changed the verdict. Only in United States v. Macino, 487 F.2d 750 (7th Cir. 1973) did the court find that a missing witness, even though his testimony was unknown, was enough to create a strong possibility of prejudice. Usually the only evidence of prejudice that is accepted must be in the record even though the Barker court realized it is difficult to demonstrate what is forgotten.

Even though "living under a cloud of anxiety and suspicion" was a "major evil protected against by the speedy trial guarantee, the Barker court considered this type of prejudice minimal for four years. Therefore, lower courts rarely mention prejudice of this nature. One can not

imagine how long this cloud must hang over a defendant's head before this prejudice becomes more than minimal if not in four years.

In spite of Smith v. Hooey, 393 U.S. 374 (1969), only a few courts have even found that pre-trial incarceration is minimal prejudice, much less existent.

CONCLUSION

After the Courts have determined which party benefits by each factor separately and how heavily each factor should be weighed, then all of the factors should be balanced to see if the defendant has been denied a speedy trial. In Barker, there was a neutral reason for the delay, no assertion by the defendant, and minimum prejudice. The Court considered this a "close" case.

The lower courts have been faced with many problems when the factors do not fall precisely within Barker. Not only is stare decisis totally lacking in the Circuit Courts and the District Courts, but there is confusion and conflict inter se among the courts.

Many facets of Barker have been criticized and some with validity. These include the Court's treatment of

of delay caused by negligence, the Court's treatment of the defendant's failure to assert his speedy trial right, and the Court's treatment of the relationship between length of delay and prejudice. Rudstein, supra at 58.

There are also many questions that remain unanswered. How should time be computed? Is time merely a "triggering mechanism" or should it be given weight as a separate factor? How long is an "appropriate" delay with a valid excuse? How heavy should a "neutral" reason for delay be weighed against the government? Who has the burden of proof of prejudice to the defendant? What is substantial prejudice? Rudstein, supra, at 58. Is actual prejudice necessary? How great does the "possibility of prejudice" have to be before prejudice becomes substantial?

The Supreme Court needs to re-examine Barker and reformulate portions of the balancing process and needs to redefine some of its guidelines. The Court indicated a willingness to do this in Strunk v. United States, supra, and Moore v. Arizona. This instant case is an excellent vehicle for the Court to reformulate and redefine. There has been no case reported where there has been a purposeful delay with no assertion as in the instant case.

Surely, when there has been a purposeful delay with substantial prejudice, assertion must not be required.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Robert F. Rush
300 Law Building
Charlotte, North Carolina
Phone: (704) ee2-6114
Counsel for Petitioner

Jo Hill Dobbins
(On Petition for Writ)

APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1347

A. B. MORRISON,

Appellee,

versus

DAVID L. JONES,
Commissioner of Correction,
Dept. of Social Rehab. and
Control for the State of
North Carolina.

Appellants.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.
James B. McMillan, District Judge.

Argued October 5, 1977
Decided October 31, 1977

Before BRYAN and FIELD, Senior Circuit Judges, and WIDENER, Circuit Judge.

Joan H. Byers, Associate Attorney General (Rufus L. Edmisten, Attorney General of North Carolina on brief) for Appellant; Robert F. Rush (Jo Hill Dobbins on brief) for Appellee.

FIELD, Senior Circuit Judge:

A. B. Morrison, a North Carolina prisoner, filed a petition for habeas corpus in the district court alleging that the state had violated his right to a speedy trial under the Sixth Amendment. The court granted the petition and North Carolina has appealed.

In an indictment returned by a state grand jury on January 5, 1970, the petitioner was charged with first degree murder allegedly committed on September 4, 1969. The first trial on February 19, 1970, resulted in a mistrial when the jury failed to reach a verdict. Some two years elapsed and on January 20, 1972, the state took

a nolle prosequi "with leave."[1] Thereafter, in December of 1972, the prosecution was revived and a new warrant was issued for Morrison's arrest. On January 29, 1973, on motion of the petitioner the case was continued for the Term of February, 1973. It was calendared for trial on April 20, 1973, at which time the petitioner's motion for another continuance was denied and trial was set for April 24, 1973. On retrial, the jury found Morrison guilty and his conviction was affirmed by the North Carolina Court of Appeals and

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1. In Klopfer v. North Carolina, 386 U.S. 213, 215, 216 (1967), the Court noted that this unusual procedure was of uncertain origin in North Carolina, although both state statutory and case law arguably provided authority for the entry of a nolle prosequi "with leave". Although it has no bearing upon our decision, we were advised by counsel at oral argument that the procedure is no longer used since the statutory basis, N.C. Gen. Stat. § 15-175 (1965), was repealed by the state's 1973 Criminal Procedure Act, Session Laws 1973, c. 1286, S.26, effective July 1, 1975. The new statute also added speedy trial provisions to the state's criminal procedure. See N.C. Gen. Stat. §§ 15A-701 through 706 (1975 Replacement Volume).

certiorari was denied by the state Supreme Court.

In granting the petition, the district judge concluded that Morrison had satisfied the four factors specified by the Court in Barker v. Wingo, 407 U.S. 514 (1972). While we agree with the district judge that the delay of some three years was sufficient to trigger a consideration of the other factors identified in Barker, in our opinion the absence of any showing of prejudice and the failure of the petitioner to assert his right to a speedy trial preclude relief in this case. The district court entered an order specifically inviting the petitioner to discuss in a separate writing all of the facts bearing upon his constitutional claim in the light of Barker, but the only response was a general reference to the state record. Other than the lengthy cloud of suspicion and anxiety attendant upon any criminal charge, Morrison asserted no claim that any witness had died or otherwise become unavailable, nor any other significant impediment to his defense as a result of the delay.

Even more palpable from the record is the fact that, like Barker, Morrison did not desire a speedy trial. The affidavit of Hugh B. Campbell, Jr., Morrison's attorney, discloses that

prior to the date of the nolle prosequi, Morrison and Campbell discussed the matter and decided not to request a retrial, and that following the nolle prosequi Morrison and Campbell, feeling that the matter was ended, filed no motions of any kind.

Based upon our examination of the record, we agree with the finding of the state post-conviction judge that between his first and second trials neither Morrison nor his counsel did anything to assert his constitutional right under the Sixth Amendment, nor was there any evidence to show that Morrison's defense was in any way impaired by the lapse of time. Accordingly, the order of the district court is reversed.

REVERSED.

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Charlotte Division
C-C-75-250

A. B. MORRISON, Petitioner,

-vs-

DAVID L. JONES, Commissioner of Correction, Department of Social Rehabilitation and Control for the State of North Carolina,
Respondent.

O R D E R

ROBERT F. RUSH and ROBERT A. KARNEY, 300 Law Building, Charlotte, North Carolina 28202, counsel for petitioner.

RICHARD N. LEAGUE, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 692, Raleigh, North Carolina, counsel for respondent.

Before James B. McMillan,
District Judge

Filed February 9, 1977

FINDINGS OF FACT

A. B. Morrison, a North Carolina state prisoner, seeks habeas corpus, alleging violation of his right under the Sixth Amendment to a speedy trial.

Petitioner and a friend and business acquaintance named George E. Cox were charged in the Superior Court of Mecklenburg County, North Carolina, with the crime of first-degree murder, allegedly committed on September 4, 1969. Cox and Morrison denied guilt. However, after several months in jail awaiting trial, the accused Cox turned state's evidence and arranged to testify against Morrison. He did so testify in both subsequent trials; his prosecution was nol prossed and was not, so far as the record shows, revived.

Morrison was tried twice.

The first trial was on February 19, 1970. It resulted in a mistrial because of a hung jury. Cox was the principal witness. His testimony tended to show the following:

Cox and Morrison worked for Connelly Home Improvement Company in Ashland, Kentucky. They and their wives were friends. Cox had a heart attack and moved back to Locust, North

Carolina. In early September, 1969, pursuant to some telephone conversations, Morrison and his wife drove from Kentucky to North Carolina to meet Cox and talk about going back into business together, either in North Carolina or back in Kentucky with Connelly.

Ralph Gordon, the deceased, was a stranger to Morrison but a personal friend of Cox. Gordon and Cox had known each other for six or seven years and had lived and worked together. They renewed close contacts when Cox returned to North Carolina.

Morrison and his brother and wife and children went to Cox's house. It was Labor Day weekend. The Morrisons and Cox and Gordon started drinking together and drank considerable amounts over a period of many hours. The three men then went to a river house owned by L. T. Smith and remained there drinking and playing cards from about 6:30 to 7:00 in the evening of September 3rd until about 11:00 P.M. They also had dinner and did some singing. There was a dispute between Morrison and Gordon over a poker hand involving a pair of queens; there was no violence; the evidence showed that they compromised the issue by "splitting the pot," and played some more poker later on. Morrison won.

Morrison and Cox and the deceased, Gordon, left the Smith cabin, all fairly well intoxicated, about 11:00 P.M. or later, and headed east toward Locust, some thirty or forty miles away. They stopped at an Esso station in Charlotte at Tryon Street and Sugar Creek Road. Gordon got out of the car to call a friend or a taxi to complete the trip to his home. Cox further testified that a few minutes later Gordon re-joined the other two at a restaurant a short distance away. The witness Cox said that he, being pretty drunk, went to sleep or "passed out." He was awakened by the sound of gunshots and looked around and saw that he was alone in the car in a church yard. Morrison got back in the car, without Gordon, and they drove home. On the way home, Cox said, Morrison told him that he had killed Gordon. Cox apparently did nothing about it and expressed only momentary surprise and disbelief. He said, in fact, that he did not believe it. (T.p.21).

Morrison and Cox drove with their families to Kentucky the next day, and spent the night in a motel near Morrison's Kentucky home. They were arrested September 6th when they went to Morrison's home, and were charged with first degree murder.

In another version of Morrison's

statements, Cox testified (T.p. 28) that Morrison told him, while they were in jail in Kentucky, that Gordon had attacked him with fists, had pulled a gun on him; and had actually fired at Morrison and that Morrison had taken the gun away from Gordon and killed him. He also testified to some threats which he said Morrison had made against him later in prison, if he, Cox, "said anything about it."

Other witnesses testified about the various events at the Smith river house that night, but Cox was the only witness to any of the events that took place after Morrison and Cox and the deceased left the Smith house after 11:00 P.M.

There was no evidence that Morrison had a gun that night; there were no fingerprint or other marks; there was no physical evidence; the only evidence against Morrison (other than statements by police relating what Cox had said to them) was the testimony of Cox himself.

The jury was unable to agree upon a verdict, and on February 19, 1970, a mistrial was ordered. Morrison was released under a $7,500.00 bond.

Two years passed, with no effort by the state to re-try Morrison.

On January 20, 1972, the state took a nol pros with leave.

In December, 1972, the prosecution was revived and a new warrant was issued for petitioner's arrest. The sole basis for the re-activation of the case was said to be some new information voluntarily offered by telephone by a Kentucky man named Spencer. Spencer told the District Attorney that he had possession of a firearm which petitioner had told Spencer he had used to kill a man in North Carolina. Spencer delivered the firearm to police. Later on, before the trial, the District Attorney determined (1) that the weapon had not been sold to the original purchaser until after the murder, (2) that the police department's ballistics experts had examined the gun and concluded that it was not the murder weapon, and (3) that there was "relatively strong" bad feeling between Spencer and Morrison.

The testimony of Spencer, on whose volunteer information the petition to re-open was based, was thus determined to be false and unreliable. Nevertheless, the District Attorney decided to proceed to trial. Petitioner pleaded not guilty but was tried and convicted of second-degree murder at the April 16, 1973

term of Mecklenburg County Superior Court, and was sentenced to, and is serving, twenty years in prison.

Spencer was not called as a witness.

The evidence at the second trial covered substantially the same ground as that at the original trial, with three exceptions. These exceptions were the testimony of the witness Whitfield, the testimony of the witness Bryan, and the testimony of Morrison himself denying all guilt.

L. G. Whitfield was an attendant at the Esso station. He had been known as a witness by the prosecution at the first trial but had not been called to testify.

Whitfield testified at the second trial that on the night of the murder three men in a car stopped at his station and asked for directions to Locust, North Carolina, and that he saw the handle of a gun on the front seat of the car. (Cox's testimony had placed Morrison at the wheel, Cox in the right front seat, and Gordon in the back seat at the time of the visit to the filling station.) Whitfield had given a statement to the police five weeks after the death, but had not mentioned a pistol. He

could not identify Morrison or Cox except that petitioner Morrison "resembled" one of the men.

The prosecuting attorney at the second trial was a new man who had not conducted the first trial. He testified, in an effort to explain why Whitfield had not been called as a witness the first time, that

> "I was informed that either he was in the hospital or for some reason he was not, he had not testified at the first trial. He was unavailable. I don't know whether they couldn't subpoena him or he was in the hospital."

This testimony falls far short of a competent showing that the witness Whitfield was in fact unavailable at the first trial, and it does not answer the question why, if due care had been taken to prepare the case for the first trial, it was not postponed as a routine matter upon motion or decision of the prosecutor.

Howard Bryan testified at the second trial. He had also been known to the prosecution at the time of the first trial, and the state on the first trial had elected not to offer his testimony. His testimony was that a week or so before Morrison

came to North Carolina, Morrison had inquired where he could buy a pistol for the protection of his wife. Bryan knew where a pistol could be bought; they went and looked at it and tried it out; and Morrison bought the gun, a 38-caliber pistol of Spanish make, some twenty-five or thirty years old.

The third exception was that Morrison testified at the second trial and denied any guilt or knowledge of the crime, and offered witnesses to his good character. Morrison testified that he and Cox parted company with Gordon, the deceased, at the Esso station, and never saw him again. He also testified that he was purchasing food for Cox's family and was trying on the trip to North Carolina to help Cox get back on his feet financially.

The only new evidence of any consequence at the second trial was thus the circumstantial testimony of the witness Whitfield that he saw the handle of a gun on the front seat of a car containing a man who "resembled" Morrison.

CONCLUSIONS OF LAW

The Sixth Amendment to the United States Constitution says:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed..."

This crime was committed on September 4, 1969, and petitioner was arrested on September 6, 1969. The first and unsuccessful prosecution ended February 19, 1970.

The accused was set free pending re-trial of his first-degree murder charge, on a bond of $1,000.00. Without explanation, the prosecution went for two years doing nothing at all about the case. On January 20, 1970, a nol pros was taken. On December 13, 1972, an order was entered by Judge William T. Grist for re-trial of the case and for Morrison's arrest. The second trial itself occurred in April, 1973, and a conviction was rendered on April 16, 1973, more than three and one-half years after the original arrest.

The question is whether failure to provide a speedy trial entitles petitioner to a writ of habeas corpus.

Several factors must be considered.

These are the length of delay; the reason for the delay; prejudice to the defendant; and whether defendant should be denied relief because he was not constantly clamoring at the prosecutor's door demanding re-trial. Barker v. Wingo, 407 U.S. 514, 530 (1972).

On this record petitioner has satisfied all necessary requirements and is entitled to be released because he was denied a speedy trial on the murder charge. Barker v. Wingo, supra; United States v. MacDonald, 531 F.2d 196 (4th Cir. 1976).

1. There was no speedy trial.-- The homicide occurred on September 4, 1969. The first trial ended on February 19, 1970. The state took a nol pros on January 20, 1972, and it was not until December of 1972, more than three years after the original arrest, that the second prosecution was instituted. On the fact of it, this is too long. Unless the constitutional requirement of speedy trial is to be stood on its head, this petitioner is entitled to relief.

If we take any account of the "evolving considerations of decency" in this field, it is worth noting that Congress has passed a law, the Speedy Trial Act, which sets sixty days as the time within which ordinarily

[federal] re-prosecution following a mistrial must be completed. 18 U.S.C. §§ 3161, et. seq.

2. No reason was given by the prosecution for the delay.-- The record is devoid of any reason for the delayed re-trial. Moreover, the reasons which prompted the new prosecution proved to be illusory. The witness Spencer and his "information" about a gun were the sole reason for the motion to re-open the case. Before the trial was started, Spencer's testimony was demonstrated to be false insofar as it connected Morrison with the gun or guns in question, and probably also to be motivated by personal ill will. Neither Spencer nor the weapon he produced was used at the re-trial. This leaves the decision to re-try hanging by one fragment of circumstantial testimony of the witness Whitfield who, on this record, is not shown to have been unavailable at the original trial.

3. The defendant was prejudiced.-- If Whitfield had testified at the first trial, the testimony about the gun and his identification could have been challenged and tested by fresh memory and circumstances. Defendant lived for more than three years with the shadow of a possible re-trial hanging over his head. He was prejudiced by

this, even though not in prison during that time. See Klopfer v. North Carolina, 386 U.S. 213, 222 (1967); United States v. MacDonald, 531 F.2d 196 (4th Cir. 1976). Testimony three and one-half years old is far less precise and reliable than testimony given promptly after an event. "Loss of memory ... is not always reflected in the record because what has been forgotten can rarely be shown." Barker v. Wingo, 407 U.S. 514, 532 (1972).

4. Defendant's failure to demand early re-trial should not bar relief.-- The duty to try and prove the case is that of the prosecution, not the defendant. The evidence shows no effort by Morrison to evade or delay re-trial at any time between the first trial in January, 1970, and the time the case was re-activated in December, 1972. In view of the length of the delay and the complete absence of excuse for it, other than weakness of the prosecution's case, defendant's passive failure to demand early re-trial is not fatal to his constitutional right.

IT IS THEREFORE ORDERED that the writ of habeas corpus issue and that petitoner be immediately released from custody. Respondent is directed to certify compliance with this order by February 15, 1977.

CERTIFICATE OF SERVICE

This is to certify that the foregoing Petition for a Writ of Certiorari was served upon David L. Jones by forwarding three copies to Rus L. Edmisten, Attorney General of North Carolina and Joan H. Byers, Associate Attorney General, Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602.

This 29TH day of November, 1977.

ROBERT F. RUSH
Attorney for Petitioner